Federal Court  Cour fédérale

**Date: 20130208**

**Docket: IMM-1543-12**

**Citation: 2013 FC 147**

**Ottawa, Ontario, February 8, 2013**

**PRESENT: The Honourable Madam Justice Gleason**

**BETWEEN:**

**QIN QIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of China, who earned a Bachelor of Arts degree from York University. Following her graduation, she obtained a three-year temporary resident permit and was employed by a small law firm in Toronto, where she carried out administrative duties and assisted with translation and interpretation for the firm's Chinese clientele. She applied for permanent resident status as a member of the new graduate category of the Canadian Experience Class, a relatively new immigration category provided for in section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

[2] In a decision dated January 31, 2012, a Case Officer of Citizenship and Immigration Canada refused the applicant's application for a permanent resident visa, holding that she lacked the requisite experience to qualify for admission. The officer based this determination on two points. First, he found that the applicant's salary was significantly lower than the minimum salary applicable in Toronto to the two occupations the applicant sought to qualify under, namely legal administrative assistants (National Occupational Classification [NOC] Code 1242) and translators, terminologists and interpreters (NOC Code 5125). In an affidavit he filed in connection with this application for judicial review, the officer explained that he obtained the comparator wage data for legal assistants and translators/interpreters from the Human Resources and Skills Development Canada [HRSDC] website, which contains extensive data on the hourly wages earned in each NOC Code. Secondly, the officer held that the applicant did not demonstrate that she carried out more than one of the main duties of the NOC Code 1242 position and thus lacked experience in that position. The NOC descriptions state that an incumbent must perform "some or all" of the listed duties.

**The Issues**

[3] This application for judicial review raises for the first time the issue of what data an officer may consider in making assessments under the new graduate portions of the Regulations. It also raises interesting questions surrounding the standard of review applicable to the officer's decision.

[4] More specifically, the applicant asserts that the officer committed a reviewable error in considering the HRSDC wage data because this criterion is not listed in the portions of the

Regulations dealing with the Canadian Experience Class (as opposed to the Federal Skilled Worker Class, which specifically references salary). Alternatively, if it was permissible for the Officer to have considered the wage data, the applicant argues that the officer violated the principles of procedural fairness in failing to disclose to her that he was doing so, thereby depriving her of the ability to respond. The applicant notes in this regard that there could well have been additional information that she could have provided (such as further details of the work she was doing or wage surveys specific to law firms, segmented by firm size and type of law practiced, which might have shown that the applicant's salary was not inordinately low for an employee in training at a very small firm doing a considerable amount of legal aid work). The applicant further argues that the officer's determination that she performed only one of the main duties listed in an NOC Code 1242 is unreasonable, because the letter of reference the applicant submitted indicated that she performed at least two of the listed duties, which under the jurisprudence must lead to the conclusion that an applicant's job experience complies with the requirements of the NOC. Finally, the applicant asserts that paragraphs 14, 15, 18 and 26 of the officer's affidavit should be struck as they attempt to impermissibly bolster his decision.

[5] In response to this last point, the respondent maintains that the impugned paragraphs in the officer's affidavit constitute merely an explanation of the background to his decision and are accordingly admissible. Insofar as concerns the officer's consideration of the HRSDC wage data, the respondent argues that wages paid to an occupation are relevant to the determination of the type of work performed and that it was accordingly appropriate for the officer to have considered the data. With respect to the alleged lack of procedural fairness, the respondent asserts that there was no need for the officer to disclose to the applicant that he was considering the HRSDC wage

data as it related to the assessment of the applicant's experience, which clearly was at issue. As concerns the officer's assessment, the respondent argues that his conclusions are reasonable, based on the evidence before him. The respondent finally raises an additional point and argues that the documentation submitted by the applicant fails to meet the requirements for NOC Code 5125 and that this represents an additional basis for upholding the officer's decision. The respondent argues in this regard that the application would be bound to fail if the matter were remitted for re-determination as the applicant must meet the requirements of both of the occupations she listed to have worked sufficient hours to qualify for admission as a member of the Canadian Experience Class and cannot meet the requirements of NOC Code 5125.

[6] As is more fully discussed below, while the binding authority from the Court of Appeal mandates that the officer's interpretation of the Regulations be reviewed on the correctness standard, the jurisprudence from the Supreme Court of Canada suggests that the reasonableness standard should be applied to the review of this interpretation. However, nothing turns on the standard of review in this case as under either the correctness or the reasonableness standard of review the officer did not err in having regard to HRSDC wage data for purposes of assessing the applicant's work experience. Procedural fairness, though, required that the officer disclose the fact he was relying on this data to the applicant so as to provide her with an opportunity to respond to it. I have accordingly determined that the officer's decision must be set aside and the application remitted to another visa officer for re-determination, following provision of an opportunity to the applicant to make submissions regarding the HRSDC wage data. I have also determined that the standard of review applicable to the officer's assessment of the applicant's experience against the NOC Code descriptions is reasonableness and that it is accordingly not

necessary or appropriate for me to rule on the reasonableness of the officer's assessment of the applicant's experience under NOC Code 1242 nor to decide whether the applicant would meet the NOC Code 5125 requirements as that is a matter which should be assessed by a visa officer and not the Court in the first instance.

[7] As is evident from the foregoing, the following issues are considered in this decision:

i. What standard of review is applicable to the various errors alleged;

ii. Should portions of the officer's affidavit should be struck;

iii. Was the officer entitled to consider comparable wage information from the HRSDC website in his assessment;

iv. Was the officer required to disclose to the applicant that he was considering the HRSDC wage data; and

v. Should I rule on the reasonableness of the officer's assessment of the applicant's experience or on whether the applicant meets the requirements of NOC 5125?

Each of these issues is discussed below.

**What standard of review is applicable to the various errors alleged?**

[8] The question of what portions of the officer's affidavit are properly before the Court on this application is evidently not part of the decision being reviewed and thus no standard of review applies to this question. In terms of the fourth issue, it is well-established that no deference is owed to decision-makers on questions of procedural fairness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 229 at para 43; *Zhao v*

*Canada (Minister of Citizenship and Immigration)*, 2013 FC 75 at para 5). Thus, it is for me to settle issues 2 and 4.

[9] The situation is less clear with respect to issue 3, which involves determination of the standard of review applicable to visa officers' decisions and, more particularly, to the interpretation of the Regulations implicit in the officer's having chosen to consider the HRSDC wage data in assessing the applicant's experience. The parties disagree regarding the applicable standard, with the applicant arguing that it is correctness and the respondent arguing that the reasonableness standard applies.

[10] The recent jurisprudence of the Supreme Court of Canada suggests that the reasonableness standard should apply to the review of this determination as the officer is interpreting and applying his home statute (or regulation) and normally deference is accorded in such circumstances (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54 [*Dunsmuir*]; *Nolan v Kerry (Canada) Inc,* 2009 SCC 39 at para 34 [2009] 2 SCR 678; *Celgene Corp v Canada (Attorney General),* 2011 SCC 1 at para 34, [2011] 1 SCR 3 [*Celgene*]; *Alliance Pipeline Ltd v Smith*, 2011 SCC 7 at para 28, [2011] 1 SCR 160 [*Smith*]; *Canada (Attorney General) v Mowat*, 2011 SCC 53 at paras 15-27, [2011] 3 SCR 471; *ATA v Alberta (Information and Privacy Commissioner),* 2011 SCC 61 at para 30, 339 DLR (4th) 428). Certain recent decisions from this Court endorse the application of the reasonableness standard to the review of a visa officer's interpretation of the requirements of the Regulations (*Grusas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 733 at para 12; *Nabizadeh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 365 at para 27).

[11] The Federal Court of Appeal, however, has indicated otherwise, holding in *Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 339 [*Khan*] at para 26 and *Patel v Canada (Minister of Citizenship and Immigration*, 2011 FCA 187 [*Patel*] at para 27 that the correctness standard of review applies to interpretations of the Regulations by visa officers. (See also *Takeda Canada Inc v Canada (Minister of Health)*, 2013 FCA 13 at para 116, where Justice Dawson, writing for the majority, endorses the application of the correctness standard to visa officers' interpretations of the Regulations in the context of discussing other issues.) The reasoning underlying these decisions, expressly noted in *Patel* at para 26, relies on statements from the Supreme Court in *Dunsmuir* at para 62, which instruct that the first step in determining the applicable standard of review is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question". The Court of Appeal applied this instruction and held that the jurisprudence had previously determined that the correctness standard applied to the review of visa officers' interpretations of the Regulations (relying on the pre-*Dunsmuir* decisions in *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706; *dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186, [2007] 1 FCR 387 and *Shahid v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 40). The Court of Appeal thus concluded that the correctness standard continues to apply subsequent to *Dunsmuir* (see *Patel* at paras 26-28).

[12] Given the decisions of the Supreme Court issued subsequent to *Patel*, it is arguable whether the application of the correctness standard to visa officers' interpretations of the Regulations can still be said to be "satisfactory" as its application appears to conflict with recent

guidance from the Supreme Court of Canada establishing that deference should be afforded to an administrative decision-maker's interpretation of its home statute.

[13] If the happenstance of whether the case law had determined prior to *Dunsmuir* that the correctness standard of review applies to a provision in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, [the *IRPA*] requires that the correctness standard continue to apply to that provision, the result may well be that there will be a patchwork applicable to judicial review in immigration law, with those provisions in the *IRPA* and the *Regulations* that previously had been held to be subject to the correctness standard continuing to be subject to full curial review and new provisions or those which had not previously been analysed presumably being accorded defence, as required by the Supreme Court of Canada. It is difficult to see how this could be said to be satisfactory. Indeed, both Justice Stratas in *Toussaint v Canada (Attorney General)*, 2011 FCA 213 at paras 17-20 and Chief Justice Crampton in *Lukaj v Canada (Minister of Citizenship and Immigration)*, 2013 FC 8 at para 12 have commented to this effect.[1] Be that as it may, the rulings of the Court of Appeal in *Khan* and *Patel* are directly on point and thus binding on me so I am required to apply the correctness standard of review to the officer's interpretation of the Regulations. Happily nothing turns on this point, as the same result pertains under either standard.

[1] Chief Justice Crampton raised but questioned an alternate basis for the application of the correctness standard to visa officers, namely, that they are ministerial delegates and their legal interpretations might therefore always be subject to the correctness standard. I likewise question this alternative argument as it seems to me that visa officers making decisions interpreting the Regulations are much closer to an administrative tribunal than an alter ego for the Minister, and thus their situation would appear to not fall within the ruling in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40, which determined that a Minister cannot shield from curial review his or her interpretation of a law that binds the Minister to a certain course of action.

[14] The fifth issue that arises in this case also requires consideration of the standard of review applicable to the officer's assessment of the experience possessed by a candidate when compared to the descriptions in the NOC matrix, because determination of the applicable standard informs whether it is appropriate for me to decide if the applicant possessed the experience required for issuance of the visa or whether her file should be remitted back to another visa officer for a re-determination. Such assessments involve either factual determinations or findings of mixed fact and law. Normally, the reasonableness standard of review applies to findings of fact or of mixed fact and law (*Dunsmuir* at para 51; *Patel* at paras 36-37; *Thiruguanasambandamurthy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1518 at para 27 [*Thiruguanasambandamurthy*]; *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25 at para 19 [*Talpur*]).

[15] There are, however, certain statements in *Khan* that could be read as mandating a correctness standard for all aspects of a visa officer's decision, but these statements are premised on the Court's earlier ruling in *Patel*. In *Khan*, Justice Pelletier, writing for the Court, stated as follows: "This Court has held that the standard of review to be applied to a visa officer's decision is correctness: see *Patel v. Canada (Minister of Citizenship & Immigration)*, 2011 FCA 187, [2011] F.C.J. No. 843 (F.C.A.) at para. 27 […]." *Patel*, however, did *not* mandate application of the correctness standard to all aspects of a visa officer's decision, but, rather, only to the officer's interpretation of the Regulation. In terms of the review of the officer's actual assessment of the applicant's file, the Court of Appeal in *Patel* applied a reasonableness standard.

[16] As *Khan* relies on *Patel* and as the jurisprudence in other contexts overwhelmingly requires application of the reasonableness standard to an inferior tribunals' determinations of fact and of mixed fact and law, I believe the authorities support the application of the reasonableness standard to the officer's assessment of the applicant's job experience – as set out in the documents she filed – and comparison of that experience to the descriptors contained in the NOC matrix. Accordingly, deference must be afforded to such determinations. As is discussed below, this conclusion has important implications for the alternative argument advanced by the respondent.

**Should portions of the officer's affidavit be struck?**

[17] Turning, then, to the request to strike portions of the officer's affidavit, there are several propositions that may be drawn from the authorities. First is the recognition that the "decision" subject to review in a case such as this is the letter sent to the applicant, advising of the rejection of her application, and the Computer Assisted Immigration Process System [CAIPS] notes of the officer, which were created before the formal letter was signed and record the officer's reasoning for the determination (*Kalra v Canada (Minister of Citizenship and Immigration)*, 2003 FC 941 at para 15 [*Kalra*]). Second, the materials before the Court in a judicial review application are normally the tribunal's decision and the record before the tribunal. Third, the case law teaches that decision-makers will be allowed to make submissions in an application for judicial review of their decisions only to the extent that may be required to provide needed context to the reviewing court, and will not be allowed to make submissions on the merits of the application as this is unseemly (*Northwestern Utilities et al v The City of Edmonton*, [1979] 1 SCR 684 at 708-709 [*Northwestern Utilities*]; *Vancouver Wharves Ltd v ILWU, Local 514*, 60 NR 118 at paras 5-8,

[1985] BCWLD 1701 (FCA)). Indeed, in *Northwestern Utilities* at p 710, Justice Estey, writing for the Supreme Court, stated, "To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions".

[18] The foregoing principles have been applied in the context of visa officers to permit affidavits from them to be filed in applications to review their decisions so long as the affidavits merely provide background context or facts relevant to allegations of violation of procedural fairness or bias. Conversely, affidavits which seek to bolster the decision by providing new or expanded reasons for the decision are not admissible (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45-47; *Kalra* at para 15).

[19] Application of the foregoing principles results in the impugned paragraphs in the officer's affidavit being struck. They fall on the impermissible side of the line as each constitutes further and expanded argument setting forth additional reasons why the decision was made. In many instances, the content of the officer's affidavit goes well beyond what was contained in the CAIPS notes. As Justice Martineau said in *Kalra* at para 15, "[I]f I compare the visa officer's CAIPS notes and affidavit, it is obvious that the latter incorporates a lot more information than the former which raises the question: upon what documents, information or notes did the visa officer base [the] affidavit, which was executed [well] after the decision." This reasoning applies with full force and effect to the impugned paragraphs in the officer's affidavit. Accordingly, paragraphs 14, 15, 18 and 26 of the officer's affidavit shall be struck and have not been considered by me in making this decision.

**Was it improper for the officer to have considered the HRSDC data on wage rates payable to NOC Codes 1242 and 5125?**

[20] Turning next to the central issue in this case – the propriety of considering comparator salary data – it is useful to reproduce the regulatory provisions applicable to the Canadian Experience Class because this is the first time this issue has been considered by this Court.

Section 87.1 of the Regulations provides:

*Canadian Experience Class*

Class

87.1 (1) For the purposes of subsection 12(2) of the Act, the Canadian experience class is prescribed as a class of persons who may become permanent residents on the basis of their experience in Canada and who intend to reside in a province other than the Province of Quebec.

Member of the class

(2) A foreign national is a member of the Canadian experience class if

(a) they

(i) have acquired in Canada within the 24 months before the day on which their application for permanent residence is made at least 12 months of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix, and have acquired that work experience after having obtained

(A) a diploma, degree or trade or apprenticeship credential issued on the

*Catégorie de l'expérience canadienne*

Catégorie

87.1 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie de l'expérience canadienne est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur expérience au Canada et qui cherchent à s'établir dans une province autre que le Québec.

Qualité

(2) Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes :

a) l'étranger, selon le cas :

(i) a accumulé au Canada au moins douze mois d'expérience de travail à temps plein ou l'équivalent s'il travaille à temps partiel dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions au cours des vingt-quatre mois précédant la date de la présentation de sa demande de résidence permanente et, antérieurement à cette expérience de travail, a obtenu au Canada, selon le cas :

(A) un diplôme, certificat de compétence ou

completion of a program of full-time study or training of at least two years' duration at a public, provincially recognized post-secondary educational or training institution in Canada,

(B) a diploma or trade or apprenticeship credential issued on the completion of a program of full-time study or training of at least two years' duration at a private, Quebec post-secondary institution that operates under the same rules and regulations as public Quebec post-secondary institutions and that receives at least 50 per cent of its financing for its overall operations from government grants, subsidies or other assistance,

(C) a degree from a private, provincially recognized post-secondary educational institution in Canada issued on the completion of a program of full-time study of at least two years' duration, or

(D) a graduate degree from a provincially recognized post-secondary educational institution in Canada issued on the completion of a program of full-time study of at least one year's duration and within two years after obtaining a degree or diploma from an institution referred to in clause (A) or (C), or

(ii) have acquired in Canada within the 36 months before the day on which their application for permanent residence is made at least 24 months of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix; and

(b) they have had their proficiency in the English or French language assessed by an organization or institution designated under

certificat d'apprentissage après avoir réussi un programme d'études ou un cours de formation nécessitant au moins deux ans d'études à temps plein et offert par un établissement d'enseignement ou de formation postsecondaire public reconnu par une province,

(B) un diplôme, certificat de compétence ou certificat d'apprentissage après avoir réussi un programme d'études ou un cours de formation nécessitant au moins deux ans d'études à temps plein et offert par un établissement d'enseignement postsecondaire privé au Québec qui est régi par les mêmes règles et règlements que les établissements d'enseignement publics et dont les activités sont financées, pour au moins 50 %, par le gouvernement notamment, au moyen de subventions,

(C) un diplôme universitaire après avoir réussi un programme d'études nécessitant au moins deux ans d'études à temps plein et offert par un établissement d'enseignement postsecondaire privé reconnu par une province,

(D) un diplôme d'études supérieures après avoir réussi un programme d'études à temps plein d'une durée d'au moins un an, offert par un établissement d'enseignement postsecondaire reconnu par une province, au plus tard deux ans après avoir obtenu un diplôme d'un établissement visé aux divisions (A) ou (C),

(ii) a accumulé au Canada au moins vingt-quatre mois d'expérience de travail à temps plein ou l'équivalent s'il travaille à temps partiel dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions au cours des trente-six mois précédant la date de la présentation de sa demande de résidence permanente;

subsection (4) and have obtained proficiencies for their abilities to speak, listen, read and write that correspond to benchmarks, as referred to in Canadian Language Benchmarks 2000 for the English language and Niveaux de compétence linguistique canadiens 2006 for the French language, of

(i) in the case of a foreign national who has acquired work experience in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A of the National Occupational Classification matrix,

(A) 7 or higher for each of those abilities, or

(B) 6 for any one of those abilities, 7 or higher for any other two of those abilities and 8 or higher for the remaining ability, and

(ii) in the case of a foreign national who has acquired work experience in one or more occupations that are listed in Skill Level B of the National Occupational Classification matrix,

(A) 5 or higher for each of those abilities, or

(B) 4 for any one of those abilities, 5 or higher for any other two of those abilities and 6 or higher for the remaining ability.

Application

(3) For the purposes of subsection (2),

(a) full-time work is equivalent to at least 37.5 hours of work per week;

(b) any period of self-employment or unauthorized work shall not be included in calculating a period of work experience;

b) il a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée aux termes du paragraphe (4) et obtenu, pour les aptitudes à parler, à écouter, à lire et à écrire, selon le document intitulé Niveaux de compétence linguistique canadiens 2006, pour le français, et le Canadian Language Benchmarks 2000, pour l'anglais, les niveaux de compétence suivants :

(i) s'il a une expérience de travail dans une ou plusieurs professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A de la matrice de la Classification nationale des professions:

(A) 7 ou plus pour chacune des aptitudes,

(B) 6 pour l'une des aptitudes, 7 ou plus pour deux des aptitudes et 8 ou plus pour l'aptitude restante,

(ii) s'il a une expérience de travail dans une ou plusieurs professions appartenant au niveau de compétences B de la matrice de la Classification nationale des professions:

(A) 5 ou plus pour chacune des aptitudes,

(B) 4 pour l'une des aptitudes, 5 ou plus pour deux aptitudes et 6 ou plus pour l'aptitude restante.

Application

(3) Pour l'application du paragraphe (2) :

a) le travail à temps plein équivaut à au moins trente-sept heures et demie de travail par semaine;

b) les périodes de travail non autorisées ou celles accumulées à titre de travailleur autonome ne peuvent être comptabilisées pour

(c) the foreign national must have had temporary resident status during their period of work experience and any period of full-time study or training;

(d) the foreign national must have been physically present in Canada for at least two years of their full-time study or training;

(e) any period during which the foreign national was engaged in a full-time program of study or training in English or French as a second language — and any period of full-time study or training in respect of which study or training in English or French as a second language amounted to most of the full-time study or training — shall not be included in calculating the period of full-time study or training;

(f) any period of study or training during which the foreign national was a recipient of a Government of Canada scholarship or bursary, or participated in an exchange program sponsored by the Government of Canada, a purpose or condition of which was that the foreign national return to their country of origin or nationality on completion of their studies or training shall not be included in calculating the period of full-time study or training; and

(g) in the case of a foreign national whose work experience is referred to in both subparagraphs (2)(b)(i) and (ii), the foreign national must obtain a proficiency in the English or French language that corresponds to the benchmarks required for the skill type, as set out in subparagraph (2)(b)(i) or (ii), in which the foreign national has acquired most of their work experience.

le calcul de l'expérience de travail;

c) l'étranger doit détenir le statut de résident temporaire durant les périodes de travail et durant toutes périodes d'études ou de formation à temps plein;

d) l'étranger doit être effectivement présent au Canada pendant au moins deux de ses années d'études ou de formation à temps plein;

e) les périodes d'études ou de formation acquises par l'étranger dans le cadre d'un programme d'anglais ou de français langue seconde à temps plein, et les périodes d'études ou de formation à temps plein consacrées principalement à l'étude de ces langues ne peuvent être comptabilisées pour le calcul de la période d'études ou de formation à temps plein;

f) les périodes d'études ou de formation acquises pendant que l'étranger était détenteur d'une bourse d'études offerte par le gouvernement du Canada ou participait à un programme d'échange parrainé par ce dernier, dans le cas où la bourse ou le programme a pour but ou condition le retour de l'étranger dans le pays dont il a la nationalité ou celui de sa résidence habituelle à la fin de ses études, ne peuvent être comptabilisées pour le calcul de la période d'études ou de formation à temps plein;

g) l'étranger qui a l'expérience de travail dans les professions visées aux sous-alinéas (2)b)(i) et (ii) doit obtenir le niveau de compétence en anglais ou en français qui est exigé aux sous-alinéas (2)b)(i) ou (ii) selon la profession pour laquelle il a le plus d'expérience.

Organisme désigné

(4) Le ministre peut désigner les institutions ou organisations chargées d'évaluer la

Designated organization

(4) The Minister may designate organizations or institutions to assess language proficiency for the purposes of this section and shall, for the purpose of correlating the results of such an assessment by a particular designated organization or institution with the benchmarks referred to in subsection (2), establish the minimum test result required to be awarded for each ability and each level of proficiency in the course of an assessment of language proficiency by that organization or institution in order to meet those benchmarks.

Conclusive evidence

(5) The results of an assessment of the language proficiency of a foreign national by a designated organization or institution and the correlation of those results with the benchmarks in accordance with subsection (4) are conclusive evidence of the foreign national's proficiency in an official language of Canada for the purposes of this section.

compétence linguistique pour l'application du présent article et, en vue d'établir des équivalences entre les résultats de l'évaluation fournis par une institution ou organisation désignée et les niveaux de compétence mentionnés au paragraphe (2), il fixe le résultat de test minimal qui doit être attribué pour chaque aptitude et chaque niveau de compétence lors de l'évaluation de la compétence linguistique par cette institution ou organisation pour satisfaire aux niveaux mentionnés à ce paragraphe.

Preuve concluante

(5) Les résultats de l'examen de langue administré par une institution ou organisation désignée et les équivalences établies en vertu du paragraphe (4) constituent une preuve concluante de la compétence de l'étranger dans l'une des langues officielles du Canada pour l'application du présent article.

[21] These provisions may be contrasted with the provisions in the Regulations on the Federal Skilled Worker [FSW] Class, which specifically contemplate review of salary as part of the eligibility determination. More specifically, the Regulations require that, in the case of an FSW application, an applicant's prospective employer must obtain a Labour Market Opinion from HRSDC, which is to be premised in part on the determination that the "wages offered to the skilled worker are consistent with the prevailing wage rate for the occupation" in Canada (clause 82(1)(c)(ii)(C) of the Regulations).

[22] The applicant argues that in the absence of a similar listing of salary as a relevant criterion in the evaluation of experience for purposes of the Canadian Experience Class (in either the Regulations or the NOC Code provisions), an officer is prohibited from considering salary as one of the factors to be weighed in assessing whether an applicant has the requisite experience in one of the listed NOC classes. The applicant asserts that an officer who considers salary in evaluating the nature of an applicant's Canadian work experience for purposes of eligibility as a member of the Canadian Experience Class fetters his or her discretion and imposes criteria that Parliament never intended. In this regard, the applicant relies on *Cheng v Canada (Secretary of State)* (1994), 25 Imm LR (2d) 162, 83 FTR 259 [*Cheng*] and *Tam v Canada (Minister of Citizenship and Immigration)* (1997), 38 Imm LR (2d) 116, 130 FTR 237 [*Tam*], where visa officers were found to have impermissibly fettered their discretion when they imported a requirement that an applicant be engaged in overall management and performance of the business in order to meet the definitions contained in the Investor and Entrepreneur Classes. In *Cheng*, Justice Cullen summarised the finding upon which the applicant relies, in the following way:

> 9 This strict reading of the definition of investor is not consistent with the policies of Immigration Canada, as set out in the Regulations or expressed in the guidelines. It is not intended that the applicant operate a wholly-owned business or a wholly-owned undertaking. That interpretation is clearly wrong and the addition of such a criterion does amount to an error of law which adversely affected the exercise of her jurisdiction and which warrants referring the matter back to a different immigration officer for redetermination. Essentially, by imposing her own criteria for the definition of investor on the circumstances of the applicant, the officer has fettered her discretion. Further, unless and until some new guidelines are introduced, the parties affected by the policy are entitled to be treated in a consistent manner, not to the arbitrary addition of criteria by each particular immigration officer.

The applicant urges that similar reasoning be applied here.

[23] I do not believe it should be. In the first place, it is debatable whether there remains any place for the concept of the fettering of discretion as an independent ground of review, in light of the recent developments in administrative law, commencing with the decision of the Supreme Court of Canada in *Dunsmuir*. In *Dunsmuir* and the cases that follow it, the Supreme Court has traced a single basis for the evaluation by reviewing courts of the content of administrative tribunals' decisions, namely, the evaluation of whether or not they are reasonable or correct. As Justice Stratus recently noted in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 23, the concept of fettering discretion lives "uncomfortably" with the approach to judicial review that has been endorsed by the Supreme Court since *Dunsmuir*.

[24] It is not necessary in this case to decide whether the concept of fettering discretion remains a stand-alone ground of review as, even if it does, I do not believe that the officer in this case improperly fettered his discretion. There is an important distinction between what occurred here and what happened in *Cheng* and *Tam*. There, the relevant provisions in the Regulations and applicable departmental guidelines outlined to a far greater extent than here the parameters of what could be permissibly considered by the officer in determining eligibility.

[25] In *Cheng*, the *Immigration Regulations*, SOR/78-172 provided that to be considered as an investor an applicant was required, amongst other things, to meet the criterion of "successful operation, control or direction of a business or a commercial undertaking" (ss 2(1)). Immigration Canada had issued Guidelines, indicating that the investor class was "not limited to owners,

presidents or vice presidents, but [was] intended to extend to persons who have held a post of significant responsibility, such as a manager of a particular division or section of a larger company" (*Cheng* at para 5). These provisions provide much more direction to an officer as to the scope of permissible inquiry than does section 87.1 of Regulations in respect of the evaluation of experience for purposes of the Federal Experience Class.

[26] Likewise, in *Tam*, the relevant regulatory provision stipulated that an "entrepreneur" meant an immigrant,

> (a) who intends and has the ability to establish, purchase or make a substantial investment in a business or commercial venture in Canada that will make a significant contribution to the economy and whereby employment opportunities will be created or continued in Canada for one or more Canadian citizens or permanent residents, other than the entrepreneur and his dependants, and
>
> (b) who intends and has the ability to provide active and ongoing participation in the management of the business or commercial venture

[27] In face of these provisions, Justices Cullen and Pinard concluded that the officers in question had fettered their discretion in requiring the applicants to demonstrate that they were responsible for the overall management and performance of the company that employed them. Effectively, such a definition would have limited the classes only to those in a presidential or vice-presidential position, which Parliament never intended, and, at least in *Tam*, added criteria that were completely different from those in the Regulations.

[28] Here, on the other hand, section 87.1 of the Regulations requires an officer to evaluate whether a candidate has experience in one of the listed NOC occupations, but provides no

guidance as to how such experience is to be evaluated, other than by reference to the listing of duties contained in the NOC matrix.

[29] Significantly, only the more senior and complex jobs in the administrative category qualify as occupations for the Canadian Experience Class. Thus, for example, work in a purely clerical position (at Skill Level C in the NOC matrix) would not qualify but work in the more skilled occupation of legal assistant (at Class B) does.

[30] In evaluating whether or not an applicant's experience falls within a permissible NOC Code, an officer is required to understand the nature of the work performed and the degree of complexity of the tasks undertaken, to determine whether or not they fall within the duties listed in the relevant NOC Code descriptors. The requisite analysis necessitates much more than a rote comparison of the duties listed in the NOC Code with those described in a letter of reference or job description. Rather, what is required is a qualitative assessment of the nature of the work done and comparison of it with the NOC Code descriptor. Indeed, there is a line of authority which indicates that, in the context of Federal Skilled Workers (where an officer is similarly required to assess duties performed against the NOC Code descriptors), the officer may legitimately question whether the applicant possesses the relevant experience if all that he or she does is repeat the duties from the NOC descriptor in a letter of reference. In such cases, this Court has sometimes held that an officer is required to hold an interview or pose additional questions in writing to an applicant, in order to obtain more detail about the actual nature of the work performed (see e.g. *Talpur* and *Patel v Canada (Minister of Citizenship & Immigration)*,

2011 FC 571). Thus, it is beyond debate that the officer must undertake a substantive analysis of the work actually done by an applicant.

[31] As the respondent correctly notes, salary paid is typically one indicator of the complexity of the work performed, as the more complex the task, generally, the higher the wages paid for it. During the argument of this application, counsel for the applicant candidly conceded that there may well be a rational connection between the nature of the work performed and wages paid, which, indeed, is a fairly self-evident proposition. The connection between wages and job complexity is recognized in other spheres. For example, pay equity and employment standards legislation require payment of equal wages for work of equal or equivalent value performed by men and women, thereby confirming that compensation should follow complexity of the work performed (see e.g. *Canadian Human Rights Act*, RSC 1985, c H-6 at s 11; *Equal Wages Guidelines*, SOR/8-1082; Ontario's *Pay Equity Act*, RSO 1990, c P-7 and Ontario's *Employment Standards Act*, SO 2000, c 41 at s 42). Thus, average wages paid in the Toronto area (where the applicant worked) for jobs within the applicable NOC Codes is certainly relevant to the assessment of the nature of the applicant's experience.

[32] Moreover, as part of the application process, the applicant was required to have her employer attest to her salary in the letter of reference; this is required by point 6 in the respondent's Document Checklist. While this is certainly not determinative of the interpretation to be afforded to the Regulations, as was the case with the Departmental Guidelines in *Cheng*, the requirement to provide salary data is indicative of the respondent's view of the factors which are relevant to the assessment of experience. (The request for salary information is not only

required in order to verify the full-time status of an employee, as the applicant claims. If all that was relevant was verifying full-time status, it would be far simpler and less invasive of candidates' privacy interests to merely have the employer confirm the hours worked by an applicant.) Thus, the documents furnished by the respondent to applicants contemplate that salary information must be provided and therefore presumably will be considered in the assessment of the application.

[33] Contrary to what the applicant asserts, the officer did not use salary as a preliminary disqualifying factor or to perform a "gatekeeper function" to disqualify the applicant's application. Had the officer done so – as the respondent conceded – he may well have engaged in an unreasonable and incorrect interpretation of the Regulations. In this regard, there is a significant difference between requiring a minimum salary as the starting point for consideration – and weeding out those who do not earn the minimum salary – as compared to examining the salary paid as but one of the data points relevant to determining if an applicant possesses the requisite experience to qualify as a member of the Canadian Experience Class.

[34] In this case, the officer did not use salary as a preliminary disqualifying factor. Rather, the officer considered the salary information as one fact relevant to the evaluation of the nature and degree of the applicant's experience. The fact that the officer did not use the salary information as a preliminary disqualifying factor is evident from his letter to the applicant and the CAIPS notes. Both contain a comparison of the applicant's duties as detailed in the letter of reference to those listed in NOC Code 1242. Had the officer used the salary analysis as a preliminary disqualifying factor, it would not have been necessary for him to have gone on to

discuss and analyze the nature of the duties performed by the applicant – as listed in her letter of reference – and compare them to the duties listed in the NOC Code 1242.

[35] Moreover, given the brevity of the letter of reference and the ambiguity of certain of the statements contained in it regarding the nature of the duties performed by the applicant, the officer reasonably required additional data beyond that set out in the letter of reference for a more complete assessment. It was open to him to consider the salary paid to the applicant and to compare it to the salaries typically paid to those working as legal assistants and translators/interpreters in the Toronto area, where the applicant worked, as one piece of information relevant to determining if the applicant possessed the requisite experience to obtain a visa under section 87.1 of the Regulations. In this regard, it is to be recalled that this Class applies only to higher skilled administrative occupations; a relevant factor in assessing whether the applicant actually possesses the requisite experience is consideration of the wages paid. If they are far lower than those typically paid for comparable work, and if the documentation otherwise submitted detailing the nature of the work performed does not definitively establish the requisite experience, an officer may reasonably reject a visa application for permanent residence as a member of the Canadian Experience Class.

[36] Thus, in ascertaining whether the applicant performed the work of NOC Codes 1242 and 1525, it was both permissible and reasonable for the officer to have considered the salary paid to the applicant in comparison to that paid in Toronto for similar work as a fact relevant to the assessment of the applicant's job experience.

**Did the officer violate procedural fairness in failing to disclose to the applicant that he was considering the HRSDC wage data?**

[37] However, while it was permissible and reasonable for the officer to have considered the HRSDC wage data, his failure to disclose to the applicant the fact that he was doing so and to provide her an opportunity to make submissions to him regarding the data was a violation of procedural fairness.

[38] This Court has made clear that where officers have questions regarding the credibility or authenticity of an application, they have a duty to go back to the applicant and give the applicant an opportunity to make further submissions, normally through an interview (*Talpur* at para 21; *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24). It is similarly well established that a decision-maker's failure to disclose extrinsic information upon which he or she relies, and that the applicant could not reasonably anticipate would be consulted, violates procedural fairness (see e.g. *Shah v Canada (Minister of Employment and Immigration)* (1994), 81 FTR 320, 170 NR 238 (FCA); *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1081 at para 32; *Tariku v Canada (Minister of Citizenship and Immigration)*, 2007 FC 474 at para 15; and *Toma v Canada (Minister of Citizenship and Immigration)*, 2006 FC 780 at para 18; *Amoateng v Canada (Minister of Citizenship and Immigration)* (1994), 90 FTR 51, 26 Imm LR (2d) 317).

[39] Here, the officer had doubts as to whether the applicant had actually fulfilled the requirements of the legal assistant NOC category, and considered average wages applicable to that category to resolve those doubts. The difference between the wages earned by the applicant and the average wages thus played an important part in the officer's conclusion that the applicant

was not acting as a legal assistant. Had the applicant been informed of the officer's concerns *vis-à-vis* her wage and been provided with notice that the officer was considering the HRSDC average wage data, she could have provided additional submissions in response, such as evidence relating to average wages paid in small law firms to people of similar experience. Likewise, had she been aware of the officer's concerns, she might have provided more detail about the kind of work she was performing for the firm. Not knowing that the officer was relying on average wage data, the applicant had no reason to submit such information.

[40] The failure of the officer to inform the applicant of his consideration of average wage data thus amounts to a violation of procedural fairness. The consideration of the data was a key step in the officer's reasoning and was not something that the applicant could reasonably have anticipated might be an issue.

[41] As a result, this matter must be remitted to another visa officer to allow the applicant to make additional submissions related to the complexity of her duties and salary paid in respect of them.

[42] In light of this, it is not necessary or appropriate to address whether this officer's evaluation of the duties performed by the applicant was reasonable as the new officer will have additional information to consider on the re-determination by reason of the opportunity that the applicant will have to file additional evidence. Thus, any comments I might make on the reasonableness of the officer's assessment would be at best superfluous and at worst prejudicial

to one or the other of the parties as they might well influence the re-determination but would not be based on the full record that will be considered on re-determination.

**Should this application be dismissed due to the applicant's ineligibility under NOC Code 5125?**

[43] The same may also be said of the respondent's alternative argument that requests I rule on the applicant's alleged ineligibility under NOC Code 5125. More specifically, these same concerns indicate that I ought not rule on the applicant's alternative argument as additional evidence will possibly be placed before the officer on re-determination related to whether the applicant has experience within NOC Code 5125. Thus, my commenting on the issue would be superfluous and potentially prejudicial.

[44] In addition, there is an important institutional reason why I should not consider whether the applicant would meet the experience requirements under NOC Code 5125: doing so would have me usurp the role of a visa officer. As already discussed, the reasonableness standard of review applies to the review of visa officers' assessments of evidence and comparison of that evidence to the requirements of the NOC matrix to determine if an applicant possesses the requisite experience for admission as a member of the Canadian Experience Class. This means that it is outside the proper scope of review for this Court to substitute its views for those of a visa officer in matters of candidate suitability (see e.g. *Thiruguanasambandamurthy* at paras 27-28, *Talpur* at para 19; *Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 302 at para 9; *Arora v Canada (Minister of Citizenship and Immigration)*, 2011 FC 241 at para 23). In light of this, I believe I should not grant the respondent's request to dismiss this application by reason of the applicant's alleged ineligibility under NOC Code 5125. The officer did not address

whether the details of the applicant's duties fell within the list of duties contained in NOC Code 1525 in his decision, and it is far from self-evident what the conclusion would be on this point. It is not for this Court to address this issue as this would require that I act as a visa officer and make a finding that is squarely within the jurisdiction and scope of expertise of an officer (see *Canada (Attorney General) v Kane*, 2012 SCC 64 at para 9 [*Kane*]; *Szabo v Canada (Citizenship and Immigration)*, 2012 FC 1422 at para 11). Indeed, as the Supreme Court held in *Kane* (at para 9), to do this would fall into the error of "undertaking [my] own assessment of the record", which a reviewing court ought not do.

[45] Thus, it is not appropriate for me to rule on the respondent's alternative argument.

**Should a question be certified under sub-section 74(1) of the *Immigration and Refugee Protection Act*?**

[46] Finally, consideration must be given to whether I should certify a question under section 74 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] to allow for an appeal. Both parties concurred that in the event I address the propriety of the officer's considering the HRSDC wage data in my decision, a question should be certified on this issue under subsection 74(1) of the IRPA as this is the first time the issue has arisen in the case law and is an issue which will apply broadly to future applicants. I agree. I accordingly certify the following question:

> "Is it permissible or reasonable for a visa officer to consider HRSDC comparator salary data when assessing the nature of the work experience of an applicant who wishes to qualify as a member of the Canadian Experience Class, as described in section 87.1 of *Immigration and Refugee Protection Regulations*, SOR/2002-227?"

[47] In addition, because my decision to decline to deal with the request that I evaluate the applicant's experience under NOC Code 5125 rests in considerable part on my assessment of the standard of review applicable to visa officers' decisions, and in recognition of the tension between the case law from the Supreme Court of Canada and the Federal Court of Appeal on this issue, I have determined it appropriate to certify the following additional question:

> "What standard of review is applicable to a visa officer's interpretation of the Immigration and Refugee Protection Regulations, SOR/2002-227 and to an officer's assessment of an application under the Immigration and Refugee Protection Regulations, SOR/2002-227?"

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. Paragraphs 14, 15, 18 and 26 of the Affidavit of Charles Fiola are struck;
2. This application for judicial review of the March 12, 2012 decision of the officer is granted;
3. The officer's decision is set aside;
4. The applicant's application for permanent residence as a member of the Canadian Experience Class is remitted to the respondent for re-determination by a different officer;
5. In connection with that re-determination, the applicant shall be afforded an opportunity to file additional evidence and make additional submissions regarding the nature of her work experience and salary earned during the applicable reference period;
6. The following serious questions of general importance are certified under section 74 of the IRPA:

> "Is it permissible for a visa officer to consider comparator salary data when assessing the nature of the work experience of an applicant who wishes to qualify as a member of the Canadian Experience Class, as described in section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?"; and

> "What standard of review is applicable to a visa officer's interpretation of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and to the officer's assessment of an

application under the *Immigration and Refugee Protection Regulations*, SOR/2002-227?" and

7. There is no order as to costs.

"Mary J.L. Gleason"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-1543-12 |
| **STYLE OF CAUSE:** | *Qin Qin v The Minister of Citizenship and Immigration* |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | December 5, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | GLEASON J. |
| **DATED:** | February 8, 2013 |

**APPEARANCES:**

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|---|---|
| Mario D. Bellissimo | FOR THE APPLICANT |
| Lorne McClenaghan | FOR THE RESPONDENT |

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